Tentative Rulings for August 3, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG02555 ***Jose Martinez v. G & H Diesel Service*** **(Dept. 402)**

14CECG00862 ***James S. Anderson v. Florence N. Conner*** **(Dept. 403)**

16CECG01271 ***Everbank Commercial Finance, Inc. v. Sohan Singh*** **(Dept. 403)**

12CECG03902 **Bank of Stockton v. Garcia (Dept. 403)**

15CECG02924 ***Garcia v. Vang*** **(Dept. 501)**

16CECG01903 ***Serrano v. United Auto, Inc.*** **(Dept. 501)**

14CECG03918 ***Coronado v. Wells Fargo Bank*** **(Dept. 502)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG03523 ***Cordell v. Fresno Heritage*** **is continued to Thursday, August 4, 2016 at 3:30 in Dept. 501.**

16CECG00226 ***Park Place Retail Partners, LP v. Mast*** **is continued to Wednesday, August 10, 2016 at 3:30 in Dept. 402.**

16CECG01396 ***State of California v. Modern Custom Fabrication, Inc.*** **is continued to Thursday, August 18, 2016 at 3:30 in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: ***Clausell v. Lopopolo***
Case No. 15 CE CG 02496

Hearing Date: August 3rd, 2016 (Dept. 402)

Motion: Defendant Roth's Motion to Compel Plaintiff to Respond to Form Interrogatories, Special Interrogatories, Request for Production of Documents, and Request for Nature and Amount of Damages, and for Monetary Sanctions

Tentative Ruling:

To grant defendant Roth's motion to compel plaintiff to respond to form interrogatories, set one, special interrogatories, set one, request for production of documents, set one, and request for nature and amount of damages. (Code Civ. Proc. §§ 2030.290; 2031.300; 425.11.) Plaintiff is deemed to have waived all objections. (*Ibid*.) Plaintiff shall serve her verified responses without objections within 10 days of the date of service of this order.

Further, defendant is ordered to pay an additional $180 in filing fees, since he should have filed four separate motions rather than one combined motion to compel four different sets of discovery requests. Payment is due 5 days from the date of this order.

In addition, plaintiff shall pay monetary sanctions of $460 to defendant within 30 days of the date of service of this order for her willful failure to respond to discovery. (*Ibid*.)

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 8/2/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Sociedad Progresista Mexicana, "Justo Sierra" Logia 30, by and through Esteban Santos, in his official capacity as Second Vice President of the Sociedad Progresista Mexicana, Justo Sierra Logia 30 et al. v. Rosendo Robles, Emma Mendez, Roberto Peralta, Lucy Gonzalez and Beatrice Ochoa***
Superior Court Case No. 15 CECG 03576

Hearing Date: August 3, 2016 (**Dept. 402)**

Motion: Preliminary Injunction

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

CRC Rule 3.1150 states:

(a) Manner of application and service

A party requesting a preliminary injunction may give notice of the request to the opposing or responding party either by **serving a noticed motion under Code of Civil Procedure section 1005** or by obtaining and serving an order to show cause (OSC). An OSC must be used when a temporary restraining order (TRO) is sought, or if the party against whom the preliminary injunction is sought has not appeared in the action. If the responding party has not appeared, the OSC must be served in the same manner as a summons and complaint.

(b) Filing of complaint or obtaining of court file

If the action is initiated the same day a TRO or an OSC is sought, the complaint must be filed first. The moving party must provide a file-stamped copy of the complaint to the judge who will hear the application. If an application for a TRO or an OSC is made in an existing case, the moving party must request that the court file be made available to the judge hearing the application.

(c) Form of OSC and TRO

The OSC and TRO must be stated separately, with the OSC stated first. The restraining language sought in an OSC and a TRO must be separately stated in the OSC and the TRO and may not be incorporated by reference. The OSC must describe the injunction to be sought at the hearing. The TRO must describe the activities to be enjoined pending the hearing. A proposed OSC must contain blank spaces for the time and

manner of service on responding parties, the date on which the proof of service must be delivered to the court hearing the OSC, a briefing schedule, and, if applicable, the expiration date of the TRO.

(d) Personal attendance

The moving party or counsel for the moving party must be personally present when the request for a TRO is made.

(e) Previous applications
An application for a TRO or an OSC must state whether there has been any previous application for similar relief and, if so, the result of the application.

(f) Undertaking

Notwithstanding rule 3.1312, whenever an application for a preliminary injunction is granted, a proposed order must be presented to the judge for signature, with an undertaking in the amount ordered, within one court day after the granting of the application or within the time ordered. Unless otherwise ordered, any restraining order previously granted remains in effect during the time allowed for presentation for signature of the order of injunction and undertaking. If the proposed order and the undertaking required are not presented within the time allowed, the TRO may be vacated without notice. All bonds and undertakings must comply with rule 3.1130.

(g) Ex parte temporary restraining orders

Applications for ex parte temporary restraining orders are governed by the ex parte rules in chapter 4 of this division.

CCP § 1005. Written notice for motions; service and filing of moving and supporting papers states:

(a) Written notice shall be given, as prescribed in subdivisions (b) and (c), for the following motions:
(1) Notice of Application and Hearing for Writ of Attachment under Section 484.040.
(2) Notice of Application and Hearing for Claim and Delivery under Section 512.030.
(3) Notice of Hearing for Claim of Exemption under Section 706.105.
(4) Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.
(5) Motion for Determination of Good Faith Settlement pursuant to Section 877.6.
(6) Hearing for Discovery of Peace Officer Personnel Records pursuant to Section 1043 of the Evidence Code.
(7) Notice of Hearing of Third-Party Claim pursuant to Section 720.320.
(8) Motion for an Order to Attend Deposition more than 150 miles from deponent's residence pursuant to Section 2025.260.
(9) Notice of Hearing of Application for Relief pursuant to Section 946.6 of the Government Code.
(10) Motion to Set Aside Default or Default Judgment and for Leave to Defend Actions pursuant to Section 473.5.

(11) Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.
(12) Motion to Set Aside Default and for Leave to Amend pursuant to Section 585.5.
(13) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

(b) Unless otherwise ordered or specifically provided by law, **all moving and supporting papers shall be served and filed at least *16 court days* before the hearing**. The moving and supporting papers served shall be a copy of the papers filed or to be filed with the court. However, if the notice is served by mail, the required 16-day period of notice before the hearing shall be increased by five calendar days if the place of mailing and the place of address are within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States, and if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing shall be increased by two calendar days. Section 1013, which extends the time within which a right may be exercised or an act may be done, does not apply to a notice of motion, papers opposing a motion, or reply papers governed by this section. **All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least *nine court* days, and all reply papers at least *five court* days before the hearing.**

The court, or a judge thereof, may prescribe a shorter time.

(c) Notwithstanding any other provision of this section, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This subdivision applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in subdivision (a).

The court, or a judge thereof, may prescribe a shorter time.

As stated in the previous ruling, a party requesting a preliminary injunction may give notice of the request to the opposing or responding party either by serving **a noticed motion under Code of Civil Procedure section 1005** or by obtaining and serving an order to show cause (OSC). [CRC Rule 3.1150] Here, the Plaintiffs opted to use the noticed motion procedure.

But, the notice of motion was **not** served 16 court days before the hearing. It was served 14 court days, if the ambiguous accompanying declaration of service is interpreted as personal service. In the alternative, if served via mail, it was served only 9 court days prior to the hearing. As for the opposition, it was **not** served 9 court days prior to the hearing. It was served 3 court days before the hearing. Therefore, the motion will be denied without prejudice.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 8/2/16 .

(Judge's initials) (Date)

(28) Tentative Ruling

Re: **GE Capital Information Technology Solutions, LLC v. Central Valley Presort, Inc., et al.**

Case No. 15CECG01006

Hearing Date: August 3, 2016 (Dept. 402)

Motion: By Plaintiff GE Capital Information Technology Solutions, LLC, as assignee of General Electric Capital Corporation to amend the judgment to include successor corporation.

Tentative Ruling:

To deny the motion.

Explanation:

Plaintiff seeks to amend the judgment to add Presort Center of Fresno, LLC ("Presort Center") as a party to the judgment on the grounds that it is a successor to defendant and judgment debtor Central Valley Presort, LLC ("CVP"). Plaintiff largely argues that the similarities between the companies and the potential inequities to Plaintiff require the Court to grant the motion. Defendant analyses the case under the alter ego theory, but alter ego liability and successor corporation liability are two distinct theories. (*McClellan v. Northridge Park Townhome Owners Ass'n* (2001) 89 Cal.App.4th 746, 753 (analyzing each distinctly pursuant to Cal. Civ.Proc. §187).)

For successor liability, the "general rule is where one corporation sells or transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the former unless (1) the purchaser expressly or impliedly agrees to such assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is merely a continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape liability for debts." (*Id.* at 753-54.)

Plaintiff here argues that Presort Center is a mere continuation of the selling corporation. However, in order to find such a continuation, a plaintiff must show one or both factual elements: "(1) a lack of adequate consideration for the acquisition of the former corporation's assets to be made available to creditors, or (2) one or more persons were officers, directors, or shareholders of both corporations." (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28-29.) There is a suggestion in the case law that the inadequate consideration factor is actually a necessary factor. (*Franklin v. USX Corp.* 2001) 87 Cal.App.4th 615, 625-26.) Here, although Plaintiff presents what it considers to be evidence of commingling of funds between the two corporations, there is no

evidence at all of the consideration paid by Presort Center, nor is there any evidence that one or more persons were "officers, directors, or shareholders of both corporations."

Absent such evidence, the Court denies the motion.

The Court expresses no opinion on the availability or applicability of any alternate measures for Plaintiff.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 8/2/16 .

(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Castaneda v. Pardini's Fair Ventures, L.P.***
Superior Court Case No.: 15CECG02991

Hearing Date: August 3, 2016 (**Dept. 403**)

Motion: Demurrer to first amended complaint by Defendants County of Fresno and State of California

Tentative Ruling:

To sustain, with Plaintiffs granted 10 days' leave to amend. The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

The third cause of action for dangerous condition of real property fails to state a cause of action against either Defendant County of Fresno or Defendant State of California. (Code Civ. Proc., § 430.10, subd. (e).)

The elements of a cause of action for dangerous condition of public property are: (1) that defendant owned or controlled the property; (2) that the property was in a dangerous condition at the time of the incident; (3) that the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred; and (4) that negligent or wrongful conduct of defendant's employee acting within the scope of his or her employment created the dangerous condition OR that defendant had notice of the dangerous condition for a long enough time to have protected against; (5) that plaintiff was harmed; and (6) that the dangerous condition was a substantial factor in causing plaintiff's harm. (Judicial Council of Cal. Civ. Jury Instns. (Dec. 2015) CACI No. 1100.)

A claim alleging a dangerous condition against a governmental entity may not rely on generalized allegations, *but must specify in what manner the condition constituted a dangerous condition*. Although it is the general rule that it is a factual question whether a given set of facts and circumstances creates a dangerous condition, the issue may be resolved as a question of law if reasonable minds can come to but one conclusion. (*Brenner v. City of El Cajon* (2003) 113 Cal.App.4th 434, 439-440, citing *Zelig v. County of Los Angeles* (2002) 27 Cal4th 1112, 1133-1139 [Demurrer properly sustained because plaintiff was "unable to point to any defective aspect of the purely physical condition of the property."])

A trailer hitch frame is an item of personal property. The first amended complaint does not allege that either of the Defendants either owned or controlled the trailer hitch frame. No feature of the real property where the accident occurred is described or mentioned in the first amended complaint, and no facts show that the risk of injury was increased or intensified by the condition of the property, or caused by a condition of the public property.

The allegations that the trailer hitch frame was not secured, "coupled with a total failure to warn," as well as failure to "cordon off and protect the area" does not specify in what manner the condition was a dangerous condition of public property.

Further, alleging the same cause of action against both the State of California and the County of Fresno, while documents judicially noticed indicate that Plaintiffs filed government claims against the 21st District Agriculture Association, the State of California, and the County of Fresno, while the 21st District Agriculture Association is not named as a defendant, renders the first amended complaint uncertain. (Code Civ. Proc., § 430.10, subd. (f).)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 8/2/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Green v. CDCR***
Court Case No. 15CECG03951

Hearing Date: **August 3, 2016 (Dept. 403)**

Motion: Motion by Defendants California Department of Corrections and Rehabilitation, Pleasant Valley State Prison, California Health and Human Services Agency, J. Beard, M. Cate, S. Hubbard, D. Hysen, T. Rothchild, and J. Yates to Quash service of Summons and Complaint

Tentative Ruling:

To grant.

Oral argument on this matter is continued to Wednesday, August 17, 2016, at 3:30 in Dept. 403 so that the Plaintiff may be present for oral argument via Court Call.

Explanation:

First and foremost, the Summons was defective <u>as issued</u>, since plaintiff improperly included information in the "Notice to Person Served" section at the bottom of Form SUM-100. Service of this defective Summons caused the service of all moving defendants to be defective. The portion below the clerk's signature should have been left blank, except for the clerk's seal, and only filled in by the process server when preparing each individual copy of the summons for service. This is so that the Summons form itself, when served, notifies the person to whom it is delivered that he or she is being served either as an individual, or as a Doe Defendant, and/or on behalf of a <u>specific</u> entity defendant. (Code Civ. Proc. § 412.30.) It is not sufficient for the process server to merely tell the person the information that should be filled in on the form. (*MJS Enterprises, Inc. v. Superior Court* (1984) 153 Cal.App.3d 555, 557.) If proper notice does not appear on the copy of the summons served, "no default may be taken against such corporation or unincorporated association or against such person individually." (Code Civ. Proc. § 412.30.)

Substantial compliance with this statute will suffice, but this requires showing some degree of compliance with it, rather than a "complete failure to comply." (*Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 865.) A defendant served with defective process is not at fault for "ignoring service," because he "was under no duty to act upon a defectively served summons." (*Slaughter v. Legal Process & Courier Service* (1984) 162 Cal.App.3d 1236, 1251.)

Here, the confusing "Notice to the Person Served" section must be deemed a complete failure to comply with Code of Civil Procedure section 412.30, as to all moving defendants. It confusingly indicated to each defendant served that they were

being served both as an individual defendant and as a Doe Defendant. As to the entity defendants, neither of these were accurate. As to the individual defendants, it only served to confuse. The evidence provided by defendants establishes that the only box which should have been filled out for the entity defendants, Box #3, was left blank. Box #3 requires that the name of the entity be written or typed in, and a box be check to specify the statutory authority for service. Here, the process server should have checked the "on behalf of" box at #3, and then checked the "other" box to indicate the public entity defendants were served pursuant to Code of Civil Procedure section 416.50. The process server did not do so; this is also clear from all proofs of services filed as to the entity defendants (further discussed below).

Defendants also challenge the authority of the persons who were served to receive service on behalf of either the entity or the individual defendants. All service was done by leaving the documents with various, supposedly authorized, people. The proofs of service for each of these state that service was authorized "per policies and procedures, in accordance with CCP 416.5." There is no such statute, so it is not clear what was intended. When a defendant challenges the authority of the person who received service allegedly on behalf of a defendant, plaintiff bears the burden of showing the party served was defendant's ostensible agent for service of process. (*Lebel v. Mai* (2012) 210 Cal.App.4th 1154, 1163.) Plaintiff has failed to do so.

Finally, all but one of the proofs of services on file (that of defendant Beard, discussed below) have defects, such that no presumption of valid service arises. (Note: this discussion deals only with proofs of service as to moving defendants, and only those filed before the date this motion was filed.) Filing a proof of service that complies with statutory standards creates a rebuttable presumption that service was proper. (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795. However, the presumption does not arise if the proof of service does not comply with the applicable statutory requirements. (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441, *as modified on denial of reh'g (May 26, 1994)*.)

Plaintiff's first proofs of service, filed March 17, March 23, and April 4, 2016, showed only mailed service on various defendants, including Notice and Acknowledgement of Receipt forms, so these clearly confer no personal jurisdiction and must be disregarded. The clerk correctly marked these "defective."

The proofs of service on the entity defendants, filed on April 6 and May 20, 2016, each had nothing checked at Box #6d, as required, and instead indicated each defendant was served as an individual defendant and as a Doe Defendant. These raise no presumption of valid service. And the proofs of service on individual defendants Yates, Cate, Hubbard, Hysen, and Rothchild did not even have the required Box #6, much less have this filled out correctly. These proofs of service also raise no presumption of valid service. The proof of service for defendant Beard filed on May 20, 2016, does have Box #6, and this is completed to indicate he was served as an individual. However, as noted above defendants have challenged the authority of Robin Stainger to accept service on his behalf and plaintiff has failed to establish on this motion that Ms. Stainger was so authorized.

The court also notes that plaintiff refers several times to defendants' defaults already being entered, as well as default judgment(s). No defaults have been entered at this time, nor has plaintiff filed a request for one, as to any defendant, on the mandatory Judicial Council form. No judgments have been entered.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 8/2/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

Tentative Rulings for Department 502

03

Tentative Ruling

Re: ***Cervantes v. City of Fresno, et al.***
Case No. 16 CE CG 00868

Hearing Date: August 3rd, 2016 (Dept. 502)

Motion: Defendants' Motion to Fix Attorney's Fees (Code Civ. Proc. Section 425.16, subd. (c))

Tentative Ruling:

To grant defendants' motion to fix attorney's fees under Code of Civil Procedure section 425.16, subdivision (c). To order plaintiff to pay attorney's fees to defendants in the amount of $14,100.

Explanation:

Under Code of Civil Procedure section 425.16, subdivision (c), "in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., § 425.16, subd. (c)(1).)

"Thus, under Code of Civil Procedure section 425.16, subdivision (c), any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

"The statute is broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating herself from a baseless lawsuit." (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 446, internal citation omitted.)

Here, defendants prevailed on their motion to strike plaintiff's claims under the anti-SLAPP statute, and therefore they are entitled to an award of their attorney's fees and costs as a matter of right. Plaintiff argues that the court should not award fees because section 425.16 is not the applicable fee statute, and that the court should apply Code of Civil Procedure section 1021.7 instead. Section 1021.7 states,

> In any action for damages arising out of the performance of a peace officer's duties, brought against a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, or against a public entity employing a peace officer or in an action for libel or slander brought pursuant to Section 45 or 46 of the Civil Code, the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs,

upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause.

Plaintiff argues that defendants have not shown that they are entitled to fees under section 1021.7 because they have not shown, and cannot show, that plaintiff's claims against peace officers and their public entity employer were not brought in good faith and with reasonable cause. However, plaintiff does not explain why the fee provision of section 425.16, subdivision (c), would not apply here, even though defendants prevailed on their special motion to strike under section 425.16, subdivision (b). As discussed above, the language of section 425.16, subdivision (c) is mandatory and requires the court to award fees where a defendant prevails on a special motion to strike, as defendants did here. (*Ketchum*, *supra*, at p. 1131.) While plaintiff argues that section 1021.7 is applicable because it is "the more specific statute", section 425.16, subdivision (c) is actually more specific to the situation here, since it applies specifically to special motions to strike SLAPP actions. Thus, the court intends to follow section 425.16, subdivision (c), not section 1021.7.

In addition, while plaintiff argues that the court should exercise its inherent discretion to deny the motion for fees here because it would be inequitable to impose fees against him under the circumstances, the court has no discretion to deny an award of attorney's fees and costs to the prevailing defendant on an anti-SLAPP motion. "[T]he award of attorney fees to a defendant who successfully brings a special motion to strike is not discretionary but mandatory." (*Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 215.) Thus, the court has no discretion to deny fees based on the equities of the situation. Since defendants are the prevailing parties here, they are entitled to their attorney's fees incurred in litigating the anti-SLAPP motion.

On the other hand, the court does intend to reduce the amount of fees requested by defendants. "[B]y its terms, Code of Civil Procedure section 425.16 permits the use of the so-called lodestar adjustment method under our long-standing precedents, beginning with *Serrano v. Priest* (1977) 20 Cal.3d 25 [141 Cal.Rptr. 315, 569 P.2d 1303] (hereafter *Serrano III*)." (*Ketchum, supra,* at p. 1131.)

"Under *Serrano III*, a court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney ... involved in the presentation of the case.'… In referring to 'reasonable' compensation, we indicated that trial courts must carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation." (*Id*. at pp. 1131–1132, internal citations omitted.)

In addition, the lodestar figure "may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award. The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of

the unadorned lodestar in order to approximate the fair market rate for such services. The '"experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong."'" (*Id*. at p. 1132, internal citations omitted.)

Here, defense counsel seeks $14,910.00 in fees based on 49.70 hours of attorney time billed at $300 per hour. It does appear that the hourly rate for defense counsel, who has over 25 years of experience and who has litigated extensively in state and federal court, is reasonable for the Fresno area. Therefore, the court will calculate fees based on the $300 per hour rate.

The issues of the case were also relatively complex, as plaintiff had alleged several claims for racial, national origin, and disability discrimination, retaliation under FEHA, malicious prosecution, and defamation. Defense counsel raised numerous arguments in the anti-SLAPP motion, including prosecutorial discretion, collateral estoppel, litigation privilege and common interest privilege under Civil Code section 47, governmental immunity, failure to exhaust administrative remedies, and failure to comply with the Government Tort Claims Act. Defense counsel was required to review multiple pleadings, as well as the underlying Internal Affairs investigation and disciplinary proceedings. Thus, defense counsel was required to spend considerable time on litigating the motion to strike.

However, it does appear that some of the time spent was excessive or duplicative. Defense counsel prepared two separate motions to strike, one for the individual defendants and one for the City. Later, counsel sought and was granted leave to file one joint, oversized brief on behalf of all defendants. While defense counsel does not seek to recover for the cost of the ex parte application to file the joint brief, or the cost of preparing the brief itself, he does seek to recover 6.30 hours for the City's brief and 8.7 hours for the individual defendants' brief. These amounts appear to be somewhat excessive in light of the many areas of overlap between the two motions. While there were some issues raised in the individuals' brief that were not raised in the City's brief, it was unnecessary to spend so much time on the two briefs. Therefore, the court intends to reduce the time for the individuals' brief to 6 hours.

Plaintiff also complains that defense counsel spent excessive time on drafting "boilerplate" declarations to support the motion for attorney's fees, and that this work could have been done by a secretary or paralegal. However, it does not appear that an excessive amount of time was spent on the declarations. Nor does it seem unreasonable that an attorney prepared the declarations rather than a secretary or paralegal, especially considering the importance of providing evidence to support the request for attorney's fees. Therefore, the court will not reduce the time spent on the motion for attorney's fees.

Consequently, the court intends to award defendants attorney's fees of $14,100 based on 47.0 hours of attorney time billed at $300 per hour.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/26/16 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Stratton v. Strack***
Case No. 15 CE CG 03128

Hearing Date: August 3rd, 2016 (Dept. 502)

Motion: Defendant's Demurrer to First Amended Complaint

Tentative Ruling:

To take the demurrer off calendar, for failure to comply with the court's June 2nd, 2016 order requiring defendant to file a declaration regarding efforts to meet and confer **in person or by telephone** before bringing the demurrer, pursuant to Code of Civil Procedure section 430.41, subdivision (a)(3).

The court again orders plaintiff's and defendant's counsel to meet and confer in person or by telephone as required by Code of Civil Procedure section 430.41, subdivision (a). If the parties do not reach an agreement resolving the objections raised in the instant demurrer, defendant may obtain a new hearing date for the instant demurrer. If a new hearing date is obtained, defendant must file a new meet and confer declaration as required by Code of Civil Procedure section 430.41, subdivision (a)(3) at least 16 court days, plus any additional time as required for service of the declaration, before the new hearing date. If, after meeting and conferring, plaintiff agrees to amend its first amended complaint, plaintiff and defendant may file a stipulation and order for leave to file a second amended complaint, which will be granted by the court without need for a hearing. (Cal. Rules of Court, rule 3.1207(4); Superior Court of California, County of Fresno Local Rules, Rule 2.7.2.)

Explanation:

The court has already taken the demurrer to the FAC off calendar once for failure to provide a declaration that complies with section 430.41. As the court noted in its June 2nd, 2016 order on the demurrer, defense counsel's declaration only shows that he sent a letter to plaintiff's counsel regarding efforts to meet and confer, whereas section 430.41 requires a meeting in person or by phone in order to comply with the meet and confer requirement. Therefore, the court took the matter off calendar and ordered the parties to engage in further meet and confer efforts in person or by phone, and then, if defendant sets another hearing date on the demurrer, he must file a declaration regarding those efforts within 16 court days. (See court's minute order adopting tentative ruling of June 2nd, 2016.)

However, despite the court's order, defense counsel has reset the matter for demurrer without filing a new declaration showing any further efforts to meet and confer in person or by phone. Thus, defendant has not complied with the court's order or with section 430.41. Consequently, the court intends to take the matter off calendar

again, and once again order the defendant to engage in meet and confer efforts in person or by phone before resetting the matter for another hearing. The court will also order defendant to file another declaration regarding the further efforts to meet and confer within 16 court days of the hearing date, plus any additional time that may be required for service of the declaration. Only if defendant complies with this order will the court hear the merits of the demurrer.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/26/16 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Pollock v. Kaiser Foundation Hospitals***
Case No. 14 CE CG 01347

Hearing Date: August 3rd, 2016 (Dept. 502)

Motion: Petition to Confirm Arbitration Award

Tentative Ruling:

To deny the petition to confirm the arbitration award, without prejudice, for failure to show proof of service on plaintiff's attorney of record and failure to provide notice of the time, date and location of the hearing. (Code Civ. Proc. §§ 1285; 1286; 1290.2; 1290.4.)

Explanation:

"Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award." (Code Civ. Proc., § 1285.)

"If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding." (Code Civ. Proc., § 1286.)

"A copy of the petition and a written notice of the time and place of the hearing thereof and any other papers upon which the petition is based shall be served in the manner provided in the arbitration agreement for the service of such petition and notice." (Code Civ. Proc. § 1290.4.)

"If the arbitration agreement does not provide the manner in which such service shall be made and the person on whom service is to be made has previously appeared in the proceeding or has previously been served in accordance with subdivision (b) of this section, service shall be made in the manner provided in Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 of this code." (Code Civ. Proc., § 1290.4, subd. (c).)

Here, defendant has not shown that it gave proper notice of the petition to plaintiff. According to the court's records, plaintiff is still represented by an attorney, Scott Barbag, yet defendant served plaintiff directly rather than serving her attorney. Defendant claims that plaintiff is *in pro per*, but no substitution of attorney has been filed with the court. Thus, it appears that plaintiff is still represented, and her attorney needs to be served with notice of the petition.

Furthermore, the petition does not give notice of the date, time or location of the hearing, so it does not appear that plaintiff was given adequate notice of the hearing. (Code of Civ. Proc. § 1290.4.) As a result, the court intends to deny the petition without prejudice and order defendant to re-serve plaintiff and her counsel properly with notice of the time, date and location of the hearing.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/27/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***McDonald v. Beck et al.***, Superior Court Case No. 13CECG03807

Hearing Date: **August 3, 2016 (Dept. 502)**

Motion: Demurrer to Third Amended Complaint

Tentative Ruling:

To overrule. (Code Civ. Proc. §§ 430.10(e), 430.41(b).)

Explanation:

Plaintiff demurs to the Third Amended Complaint's ("TAC") first and second causes of action on the ground that they do not allege facts sufficient to state a cause of action, and are barred by the statute of frauds. Defendant demurred to these same causes of action as pled in the First Amended Complaint on these same grounds. On March 25, 2014 the court overruled those demurrers, finding that the causes of action are sufficiently pled and state valid claims.

No changes to these causes of action were made in the Second Amended Complaint. On February 17, 2016, the court granted defendant's motion to expunge the lis pendens on the ground that the SAC does not set forth a real property claim. The SAC sought only damages in connection with the second cause of action for breach of contract. There was no real property claim because the SAC did not seek enforcement of the contract, specific performance or any equitable relief.

In response to the court's grant of defendant's motion to expunge the lis pendens, plaintiff sought and obtained leave to file a Third Amended Complaint in order to allege remedies of specific performance and constructive trust. A few allegations were added to support those remedies, but all other allegations remained the unchanged. Defendant again generally demurs to the first and second causes of action.

Such a demurrer is precluded by Code of Civil Procedure 430.41(b), which precludes demurrers on grounds that could have been raised in prior demurrers. Applying this statute to this demurrer would not constitute retroactive application, since the statute became effective prior the filing of the instant demurrer.

Adding allegations supporting new remedies does not sufficiently change the causes of action to warrant a new round of demurrers. Since the court already determined that the causes of action allege sufficient facts, and a demurrer is not the proper procedure to attack an improper remedy (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561-1562), no further demurrer to the TAC should have been filed.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 7/29/16 .
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Woods v. Central Valley Real Estate***
Court Case No. 13CECG03138 (*consolidated with* Case No. 15CECG03124)

Hearing Date: **August 3, 2016 (Dept. 502)**

Motion: Defendant CRP Properties, Inc.'s Motion to Strike Portions of the Second Amended Complaint

Tentative Ruling:

To grant defendant CRP Properties, Inc.'s Motion to Strike as follows: 1) to strike Paragraph 60 and the prayer at page 18:4, without leave to amend; and 2) to strike Paragraphs 52, 71, and 90, and the prayer at pages 18:1, 18:7, and 18:12, with leave to amend. Plaintiff is granted 10 days' leave to file the Third Amended Complaint. The time in which the complaint can be amended will run from service by the clerk of the minute order. New allegations/language must be set in **boldface** type.

Explanation:

To obtain punitive damages from a corporation a plaintiff must prove that an officer, director or managing agent of corporation CRP either: 1) was personally guilty of oppression, fraud or malice; 2) authorized or ratified the alleged wrongful conduct; or 3) had advance knowledge of the unfitness of a tortious wrongdoer and employed him or her with a conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (b); *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.)

The general allegations made at Paragraph 8 are sufficient to allege liability for punitive damages against a non-corporate defendant, but not against a corporate defendant. In *Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, the court held that similar allegations were sufficient against defendants who were Unions, which are non-corporate associations. (*Id.* at p. 235.)

Therefore, the punitive damage allegations are deficient as stated, but this is easily rectified by amendment. Evidentiary facts need not be alleged. (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 871.) None of the cases cited or discussed by defendant were pleading cases, but instead discussed a plaintiff's burden of proof. Plaintiffs do not have a clear and convincing standard of *pleading*, as defendant appears to suggest (see opening brief, p. 5:12-14). Only "ultimate facts" are required. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) Ultimate facts are those which raise the issues upon which the right to recover depends. "The question is whether the pleading as a whole apprises the adversary of the factual basis of the claim." (4 Witkin, Cal. Procedure (Fifth Ed.), Pleading, § 378, citing to *Semole v. Sansoucie* (1972) 28 Cal.App.3d 714.)

Pleading conclusory allegations of "oppression, fraud, and malice" is "not objectionable when sufficient facts are alleged to support the allegation." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6–7.) Likewise, general pleading of the involvement of a corporate defendant's officers, directors, or managing agents is acceptable at the pleading stage. The case of *Penner v. Falk* (1984) 153 Cal.App.3d 858 is instructive, as it discussed pleading requirements, rather than sufficiency of proof. The court quoted extensively from the complaint (*Id.* at pp. 861-865), so it is evident that plaintiff made only one general allegations about the involvement of corporate officers/directors, alleging that "the defendants, and each of them, and their officers, directors, managing agents, and/or partners" knew or should have known of the facts alleged. The court did not require more and did not even discuss this as an issue in finding the allegations sufficient to withstand a motion to strike. Instead the court only discussed the sufficiency of the supporting facts implicating oppression, fraud or malice. (*Id.* at p. 867.) Defendant did not argue or establish on its motion that the factual allegations supporting the more conclusory allegations of "oppression, fraud, and malice" at Paragraphs 52, 60, 71, and 90 were insufficient to support punitive damages, but only that plaintiffs had failed to make the necessary allegations to implicate corporate liability for such damages.

As for the First cause of action for breach of the Warranty of Habitability, such a claim can sound either in tort or in contract, depending on the facts alleged. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 915; *Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299; *Jones v. Kelly* (1929) 208 Cal. 251, 254-256; *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1070; *Smith v. David* (1981) 120 Cal.App.3d 101, 112.) Plaintiffs have alleged sufficient facts to proceed under a tort theory on this claim. "[W]here a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 663.) Defendant appears to concede this on Reply.

As for the Second cause of action for breach of the Covenant of Quiet Enjoyment, the court denies the request to take judicial notice of the email from plaintiffs' counsel. On demurrer or a motion to strike the court can take judicial notice of admissions or inconsistent statements made by a party which contradict the pleading at issue and disregard conflicting factual allegations in the complaint, but this allows notice of statements/admissions by the party, and furthermore these are statements in pleadings or those made under penalty of perjury, such as affidavits, discovery responses, or depositions. (See, *e.g., Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 605.) Defendant provided no authority for extending this to unverified statements by counsel in an email.

Even so, it is clear that the Second cause of action is grounded in contract. Punitive damages are only available for breach of the Covenant of Quiet Enjoyment if it was breached by wrongful eviction. (*Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 897-901—no authority for proposition that the claim arises when there has been no eviction and tenant remains in possession of premises.) In ruling on the demurrer to the First Amended Complaint, this court noted that a tenant who has not been ousted wrongfully may not even bring this cause of action unless the tenant remaining in

possession elects to sue on the contract. Therefore, demurrer was sustained and plaintiffs were given leave to amend. Plaintiffs' options at that point were to omit the claim, or to add allegations of wrongful eviction, or to state the claim as a breach of contract claim. The Second Amended Complaint does not add allegations of wrongful eviction. Therefore, plaintiffs have stated this cause of action in contract, and may not demand punitive damages.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 8/2/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Garcia et al. v. CCS Companies et al.***
Superior Court Case No. 15 CECG 03847

Hearing Date: August 3, 2016 **(Dept. 502)**

Motions: Demurrers to the First Amended Complaint filed by Defendants CCS Companies and Rosenberg

Tentative Ruling:

The meet and confer requirement of CCP § 430.41(a) has been met. See Declarations of Birenbaum and Rosenberg.

To grant the requests for judicial notice as stated infra.

To sustain the general demurrers on grounds of litigation privilege and statute of limitations with leave to amend.

To overrule the general demurrers on grounds of res judicata and collateral estoppel without prejudice to the filing of a motion for summary judgment.

An amended complaint in strict conformity with the ruling is to be filed within 20 days of notice of the ruling. Notice runs from the date that the Minute Order is mailed by the Clerk plus 5 days for service via mail. See CCP § 1013(a). Plaintiffs are cautioned that they are running out of chances to properly plead a cause of action. In addition, both Plaintiffs must sign the pleading. They are both self-represented. [CCP § 128.7]

Explanation:

Request for Judicial Notice

CCS requests judicial notice pursuant to Evidence Code §§ 452(d) and (h) of:

1. The first amended complaint in Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California case no. 1:12-CV-00609—AWI—SKO, filed on May 8, 2013 and the allegations contained therein.
2. The April 7, 2015 order on defendant's Rule 52 motion, in Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California case no. 1:12—CV—00609-AWI—SKO.
3. The April 7, 2015 judgment in Allstate's favor in Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California case no. 1:12-CV-00609-AWI-SKO.

4. The anti-SLAPP motion that Allstate Insurance Company served on June 21, 2012, in Garcia v. Allstate Insurance Company, United States District Court, Eastern District of California Case No. 1:12—CV—00609—AWI—SKO.

Rosenberg requests judicial notice pursuant to Evidence Code §§ 452(d) and (h) of:

1. Lawsuit entitled Allstate Insurance Company v. Efrain Garcia, an individual; OFELIA GARCIA, an individual, et al., filed in the Tulare Superior Court on October 10, 2004 and bearing Case Number PCL104534 (hereinafter referred to as the "underlying lawsuit");
2. July 15, 2008 Motion to' Set Aside Judgment filed by Plaintiffs in the underlying lawsuit;
3. September 12, 2008 General Denial Answers filed by Plaintiffs in the underlying lawsuit;
4. November 14, 2011 Dismissal of the underlying lawsuit filed by moving party herein;
5. May 8, 2013 First Amended Complaint filed by Plaintiffs, herein in the Eastern District of California, bearing Case Number 1:12—CV—OO609-AWI—SKO (hereinafter referred to as the "Federal lawsuit");
6. April 7, 2015 Rule 52(c) judgment entered in the Federal lawsuit against Plaintiffs herein.

Except for the final judgment in *Efrain Garcia and Ofelia Garcia v. Allstate Insurance Company,* United States District Court, Eastern District of California case no. 1:12-CV-00609-AWI-SKO, the requests will be granted pursuant to Evidence Code § 452(d) only; i.e., that these documents (except for the final judgment) were filed in the United States District Court for the Eastern District of California in Case No. 1:12—CV—00609—AWI—SKO and Tulare Superior Court in Case Number PCL104534. But, the contents of those documents are not "indisputably true." [*Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 113; *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484; see *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 659-660.

The court may take notice of the *existence* of findings of fact made in the other action, but may *not* accept them as *true* on issues in dispute in the present case. I.e., the other court's findings are *not* indisputably true. Otherwise, the judge in the other case would be made "infallible" on all matters, usurping the doctrines of res judicata and collateral estoppel (which are limited to final *judgments*). [*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565; see *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749; *Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145-148]

As for the final judgment in the federal action, judicial notice will be granted pursuant to Evidence Code §§ 452(d) and (h). A trial court may take notice of the prior judgment in deciding whether to sustain a demurrer based upon res judicata. [*Flores v. Arroyo* (1961) 56 Cal.2d 492, 496.]

Principles of Demurrer

A demurrer can be utilized where the complaint itself is incomplete or *discloses some defense* that would bar recovery (e.g., dates pleaded in complaint show statute of limitations has run). [*Guardian North Bay, Inc. v. Sup.Ct. (Myers)* (2001) 94 Cal.App.4th 963, 971-972; *Estate of Moss* (2012) 204 CA4th 521, 535; *Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1250]

"Face of the complaint" includes matters shown in *exhibits* attached to the complaint and incorporated by reference; or in a *superseded complaint* in the same action. [*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505—"we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits"; *George v. Automobile Club of Southern Calif.* (2011) 201 Cal.App.4th 1112, 1130—"trial court was not required to credit plaintiff's allegations that extrinsic evidence 'renders the insurance contract at issue here ambiguous'" where language of policy attached to complaint showed otherwise]

Litigation Privilege

The Civil Code § 47(b) "litigation privilege" provides *absolute immunity* for "publications" or "broadcasts" made in the course of a "judicial (or quasi-judicial) proceeding." [Civ. Code § 47(b)] Its underlying purpose is to (a) afford litigants and witnesses the "utmost freedom of access" to courts without fear of "being harassed subsequently by derivative tort actions," (b) promote the effectiveness of judicial proceedings by encouraging "open channels of communication and the presentation of evidence," (c) encourage attorneys to "zealously protect" their clients' interests, and (d) enhance the finality of judgments and avoid "an unending roundelay of litigation." [*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213-214; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321-325. The privilege is broadly worded and doubts are resolved in its favor. [*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 283; *Wang v. Heck* (2012) 203 Cal.App.4th 677, 684]

The litigation privilege was originally designed to shield litigants, their attorneys and witnesses from liability for defamation. [See *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1163, 232 CR 567, 571] However, the privilege has since been interpreted to apply to virtually all tort actions *except malicious prosecution*, see *infra*. Section 47(b) thus provides a defense to intentional infliction of emotional distress, fraud, invasion of privacy, false imprisonment, abuse of process, intentional interference with contract or prospective economic advantage, unfair competition (Bus. & Prof.C. § 17000 et seq.), negligence and even deprivation of civil rights. [See *Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216 (collecting cases); *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955-956; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194 & fn. 3; see also *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30, 45]

But CC § 47(b) provides no liability shield against malicious prosecution: Statements made in the course of a judicial proceeding are admissible to show the

action was maliciously prosecuted (litigants may not institute suit without probable cause for the purpose of obtaining a privilege to harass or defame others). [*Ribas v. Clark* (1985) 38 C3d 355, 364; *Action Apt. Ass'n, Inc. v. City of Santa Monica* (2007) 41 C4th 1232, 1242; see *Kenne v. Stennis* (2014) 230 CA4th 953, 965]

In the case at bench, the First Amended Complaint is very poorly pleaded. Although it purports to allege three causes of action for "deceit", "fraud", and negligence, none of the elements are pleaded. The tort of deceit or fraud requires: "'(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974, internal quotation marks omitted; see also *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108.)

Yet, the allegations appear to sound as "malicious prosecution." The use of the phrase "continued to seek money" is simply a substitute for "continued to litigate." In other words, the Defendants sought money from the Plaintiffs through the use of a subrogation action.

On the one hand, if the Plaintiffs intend to allege fraud-based causes of action, then the litigation privilege applies and the action is barred. See *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955-956. On the other hand, if the allegations are treated to state a malicious prosecution action, then the litigation privilege does not apply. [*Kenne v. Stennis, supra,* 230 CA4th at 965] Therefore, the general demurrers brought on this ground will be sustained with leave to amend.

Statute of Limitations

Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (It is not ground for special demurrer.) [See *Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300, fn. 2; *Iverson, Yoakum, Papiano & Hatch v. Berwald*, supra, 76 Cal.App.4th at 995; *Vaca v. Wachovia Mortg. Corp.* (2011) 198 Cal.App.4th 737, 746] The demurrer lies only where the dates in question are shown on the face of the complaint. If they are not, there is no ground for general or special demurrer (dates not being essential to the cause of action). [See *Union Carbide Corp. v. Sup.Ct. (Villmar Dental Labs, Inc.)* (1984) 36 Cal.3d 15, 25; *United Western Med. Ctrs. v. Sup.Ct. (Michelle Marie H.)* (1996) 42 Cal.App.4th 500, 505] The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint *might* be time-barred. [*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325; *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 321]

In the case at bench, CCP § 338(d) does not apply given the determination that the cause of action alleged is not fraud but malicious prosecution. As for CCP § 335.1, it is the 2-year "personal injury" statute of limitations. It has been determined that malicious prosecution is the infringement of a *personal right* (to be free from abusive litigation) and therefore is subject to the 2-year "personal injury" statute of limitations.

[CCP § 335.1; *Stavropoulos v. Sup.Ct. (Stavropoulos)* (2006) 141 Cal.App.4th 190, 197; *White v. Lieberman* (2002) 103 CA4th 210, 216; *Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 Cal.App.3d 716, 719]

As for when the action for malicious prosecution accrued, where plaintiff (defendant in the underlying action) prevailed at the trial court level in the underlying action, the malicious prosecution cause of action accrues upon *entry of judgment*. [*Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 Cal.App.3d 716, 719] Given that the Tulare action was dismissed, the cause of action accrued on that date--November 14, 2011. But, the Garcias timely filed suit in Tulare County for malicious prosecution on March 12, 2012 against Allstate. Then, this suit was transferred to federal court. Judgment was entered on April 7, 2015.

Though it may be argued that the statute ran on November 14, 2013—over two years and one month before this action was filed, this ignores the allegations that the Garcias only learned of the involvement of CCS and Rosenberg when they received discovery in the federal action. Contrary to Rosenberg's claim that these allegations render the First Amended Complaint a "sham," a plaintiff is entitled to "plead around" the statute of limitations. [*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1324]

Where plaintiff relies on the "discovery rule" to avoid a statute of limitations defense (i.e., negligent cause of injury not discovered until after the statutory period), the complaint must specifically plead facts that show (i) the time and manner of discovery, and (ii) plaintiff's inability to have made an earlier discovery despite reasonable diligence. [*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808; *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174-175] The burden is on the plaintiffs however to establish, not only the late discovery, but also their inability to discover the relevant facts earlier. [Id. at 177-178]

In the case at bench, Plaintiffs have pleaded the time and manner of discovery. However, Plaintiffs have not pleaded facts showing an inability to have made this discovery earlier with reasonable diligence. [*Fox v. Ethicon Endo-Surgery, Inc., supra* at 808. Therefore, the general demurrers on statute of limitations grounds will be sustained with leave to amend.

Res Judicata **and Collateral Estoppel**

The essence of the defense of *res judicata* is that the same parties may not litigate a second suit on the same cause of action. [*Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 31]. As a general rule, a final valid judgment on the merits in favor of or against a litigant is a complete bar to further litigation on the same cause of action or defense between or among the same parties. [*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795] Res judicata is now frequently called claim preclusion, arising when a second suit involves "(1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." [*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824].

When the subsequent action is on the same cause of action, the prior judgment is a complete bar, but there is no complete bar when the subsequent action is on another cause of action. In such a case, the former judgment is conclusive as to those issues of fact and mixed fact and law actually litigated between the parties. [*Winn v. Board of Pension Comm'rs* (1983) 149 Cal.App.3d 532, 536–37] As one court has explained:

> Collateral estoppel is a distinct aspect of res judicata. It involves a second action between the same parties on a different cause of action. The first action is not a complete merger or bar, but operates as an estoppel or conclusive adjudication as to such issues in the second action which were actually litigated and determined in the first action.

Preciado v. County of Ventura (1982) 143 Cal.App.3d 783, 786 n.2.

A general demurrer may lie where the facts alleged in the complaint or matters judicially noticed show that plaintiff is seeking relief from the same defendant on the same cause of action as in a prior action, or is asserting an issue decided against plaintiff in the prior action. [*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 792—plaintiff's wrongful death action barred by her prior voluntary dismissal of loss of consortium action against same defendant; *Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556—complaint barred by collateral estoppel; *Proctor v. Vishay Intertechnology, Inc.* (2013) 213 Cal.App.4th 1258, 1270-1271--action barred by collateral estoppel subject to demurrer even if issue wrongly decided in first action]

In the instant case, both Defendants have generally demurred on res judicata and/or collateral estoppel grounds. Notably, both Defendants discuss the defenses together. But, they are not identical. See *Preciado v. County of Ventura, supra*. As for the res judicata claim, the Plaintiffs sued Allstate Insurance Company in Tulare County and this action was moved to federal court. The parties are not the same. Therefore, on its face, the doctrine of res judicata does not apply to either Defendant. See *DKN Holdings, LLC*, supra.

CCS claims that the federal court found that it was in privity with Allstate. CCS is mentioned in the "findings of fact." But, nothing therein uses the word "privity." Instead, the order states:

> Defendant turned the claim over to CCS, a company that handles subrogation claims for Defendant. *See* Defendant's Ex. 108.
>
> CCS was responsible for pursuing subrogation claims referred to it by Defendant, but was not obligated to report all progress in the suit to Defendant. *See* Plaintiff's Ex. 7.
>
> CCS retained an attorney, Gary Rosenberg ("Rosenberg"), in October 2003, and Rosenberg unsuccessfully attempted to contact Plaintiffs. *See* Defendant's Ex. 109.

> In October 2004, CCS initiated a lawsuit in the Tulare County Superior Court ("the Tulare Action") against the Plaintiffs on behalf of Defendant. *See* Defendant's Ex. 114.

Garcia v. Allstate Ins. (E.D. Cal., Apr. 7, 2015, No. 1:12-CV-609 AWI SKO) 2015 WL 1540929, at *2

As for Defendant Rosenberg, a recent case holds that the existence of an attorney-client relationship does not establish privity between the attorney and the client for collateral estoppel purposes. The attorney is not the party and does not share the party's legal rights and interests. "Although an attorney may control the litigation to a significant degree, the attorney does so on behalf of the client rather than in service of the attorney's own interests." (*Kerner v. Superior Court* (2012) 206 C.A.4th 84, 126 [husband could not use finding in earlier family law proceeding that he did not commit domestic violence as collateral estoppel in his later action against law firm that terminated his employment, despite attorney-client relationship between members of firm and wife in family law proceeding].)

Therefore, the general demurrers brought on grounds of res judicata and/or collateral estoppel will be overruled without prejudice to reasserting via a motion for summary judgment. At present, the statements in the Declarations of Birenbaum and Rosenberg regarding their roles and the roles of their employers in the litigation (except as to the "meet and confer" requirement) cannot be accepted in ruling on the demurrers. They are extrinsic evidence. [*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881—error for court to consider facts asserted in memorandum supporting demurrer; *Afuso v. United States Fid. & Guar. Co., Inc.* (1985) 169 Cal.App.3d 859, 862, 215 CR 490, 492 (disapproved on other grounds in *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287)—error for court to consider contents of release which was not part of any court record] As for judicial notice, only final judgments can be accepted for the "truth" of their findings. [*Kilroy v. State of Calif.* (2004) 119 Cal.App.4th 140, 145-148]

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 8/2/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

(30) **Tentative Ruling**

Re: ***Daniel Porter v. Community Regional Medical Ctr.***

Superior Court No. 15CECG03720

Hearing Date: Wednesday, August 3, 2016 (**Dept. 503**)

Motion: (1) Defendant Community Regional's Demurrer
(2) Defendant Community Regional's Motion to Strike
(3) Defendant University *et al.'s* Demurrer

Tentative Ruling:
To sustain Defendants' demurrers for failure to state a cause of action regarding causes of action one (breach of fiduciary duty) and five (promissory estoppel) (Code Civ. Proc., § 430.10 (e)).

To overrule Defendants' demurrers for failure to state a cause of action regarding causes of action: two (negligent misrepresentation); three (intentional infliction of emotional distress); and four (negligent Infliction of emotional distress) (Code Civ. Proc., § 430.10 (e)).

To sustain Defendants' demurrers for uncertainty regarding Daniel and Johanna Porter (Code Civ. Proc., § 430.10 (f)).

To overrule Defendants' demurrers for uncertainty regarding collective references to "Defendants" (Code Civ. Proc., § 430.10 (f)).

To overrule Defendants' demurrers based on: Code of Civil Procedure section 430.10(g); statutes of limitations; and standing.

To order Defendant Community Regional's motion to strike off calendar.

Demurrers are sustained without prejudice. Plaintiffs are granted 10 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).) The time in which an amended pleading may be filed will run from service by the clerk of the minute order. (Code Civ. Proc., § 472b.)

Explanation:

On June 16, 2016, Defendant University *et al.* ("University") demurred to Plaintiffs' Second Amended Complaint ("SAC"). University demurrers based on: (1) failure to state a cause of action regarding cause of actions: one (breach of fiduciary duty); three (intentional infliction of emotional distress); and five (promissory estoppel) (Code Civ. Proc., § 430.010(e)); and (2) failure to allege breach of contract with specificity

regarding causes of action one (fiduciary duty) and five (promissory estoppel) (Code Civ. Proc., § 430.010(g)).

On June 17, 2016, Defendant Community Regional ("CRMC") demurred. CRMC demurrers based on: (1) uncertainty regarding Plaintiffs Daniel and Johnna Porter and regarding collective references to "Defendants" (Code Civ. Proc., § 430.010(f)); (2) failure to state a cause of action regarding all causes of action (Code Civ. Proc., § 430.010(e)); (3) statutes of limitations; and (4) standing.

Demurrer

Code of Civil Procedure section 430.10(e)
(1) Cause of action one- Breach of Fiduciary Duty
Merely alleging a doctor-patient relationship does satisfy the elements of breach of fiduciary duty. (*Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 732.) A doctor *only* breaches his fiduciary duty when he fails to disclose conflicts before obtaining consent (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164; *Moore v. Regents of Univ. of Calif.* (1990) 51 Cal.3d 120, 129; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 242.) In the SAC, Plaintiff Kyle ("Kyle") *still* does not allege that Defendants ever actually treated him. So again, no procedures means no consent, which means no breach of fiduciary duty. *Demurrer is sustained with leave to amend. New pleadings must remove this cause of action or add facts to satisfy the elements.*

(2) Cause of action two- Negligent Misrepresentation
See Tentative Ruling, adopted 3/16/16. *Demurrer is overruled.*

(3) Cause of action three- Intentional Infliction of Emotional Distress
Intentional infliction of emotional distress requires Plaintiffs to plead facts showing outrageous conduct by defendant. (*Nally v. Grace Comm. Church* (1988) 47 Cal.3d 278, 300; *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) The test for outrageousness is whether a reasonable community member, hearing what defendant did, would feel resentment and exclaim "Outrageous!" (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494.) In their intiial Complaint, Plaintiffs asserted that, in discontinuing treatment, Defendants acted outrageously (Complaint, ¶¶ 104, 107, 109, 113). Plaintiffs then asserted that "99.99% of all clinicians" would have also discontinued treatment (Complaint, ¶¶ 51, 89, 111, 131). The latter seems to support Defendants actions and contradict claims of "outrageousness." However, in their SAC, Plaintiffs clarify why "99.99% of all clinicians" would have also discontinued treatment… not because they considered Defendants' actions reasonable, but because they lacked the information necessary to make an informed decision (SAC, ¶ 111). As such, Plaintiffs allegations are adequate. It is reasonable that some community members might consider Defendants' actions outrageous. *Demurrer is overruled.*

(4) Cause of action four- Negligent Infliction of Emotional Distress
See Tentative Ruling, adopted 3/16/16. *Demurrer is overruled.*

(5) Cause of action five- Promissory Estoppel
The first elements of a promissory estoppel claim is "a promise clear and unambiguous in its terms." (*Laks v. Coast Federal Savings & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.) The doctrine is inapplicable where no clear promise is made. (*Southern Calif. Acoustics Co. v. C.V. Holder* (1969) 71 Cal.2d 719, 723.) Here, Kyle asserts that Defendants promised to provide him with a physician "comparable in education, specialized training, experience and skill" to Dr. Verrees (SAC, ¶ 143). Kyle cites to the June 11 letter to support his claim (SAC, Ex. A), but admits that his assertion is based on his subjective interpretation of that letter (SAC, ¶ 143). This is because the June 11 letter *only* states [we] "assure you that we will continue to provide care for you without interruption" (SAC, Ex. A). No clear or unambiguous promise to provide Kyle with a physician "comparable in education, specialized training, experience and skill" to Dr. Verrees exists, and Kyle makes no definitive assertion that Defendants failed to fulfil the basic promise of providing him with uninterrupted care. *Demurrer is sustained with leave to amend. New pleadings must remove this cause of action or add facts to satisfy the elements.*

Code of Civil Procedure section 430.10(f)
A demurrer for uncertainty (Code Civ. Proc., § 430.10 (f)) will be sustained only where the complaint is so bad that defendant *cannot reasonably* respond—i.e., he or she cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against him or her. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

(1) Daniel and Johnna Porter
In the initial Complaint, Daniel and Johnna Porter are identified as the "parents" of Plaintiff Kyle Porter (Complaint, ¶ 69). On revision, it appears Plaintiffs inadvertently failed to include this paragraph. Without facts tying Plaintiffs Daniel and Johnna Porter to this case, it is impossible for Defendants to determine what issues must be admitted or denied. (*Khoury v. Maly's of Calif., Inc.,* supra, 14 Cal.App.4th 616.) *Demurer is sustained, with leave to amend.*

(2) "the Defendants"
All defendants are being accused of every cause of action, which is *clear* from the bolded headings. So it does not matter that Plaintiffs refer to "the Defendants" as a collective. *Demurrer is overruled.*

Code of Civil Procedure section 430.10(g)
The party against whom a complaint has been filed may object, by demurrer, in an action founded upon a contract, where it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct. (Code Civ. Proc., 430.10 (g); *Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93.)

(1) Fiduciary Duty
Here, Kyle does not allege breach of contract. He alleges breach of fiduciary duty, based on a doctor-patient relationship (SAC, ¶ 70-72). *Demurrer is overruled.*

(2) Promissory Estoppel
Here, promissory estoppel is *clearly* based on a written letter (SAC, ¶ 142). *Demurrer is overruled.*

Statutes of Limitations
See Tentative Ruling, adopted 3/16/16. *Demurrer is overruled.*

Standing
See Tentative Ruling, adopted 3/16/16. *Demurrer is overruled.*

Res Judicata
When a demurrer was overruled, a defendant is not precluded from demurring to a cause of action in an amended complaint by the fact that the defendant's demurrer to an essentially identical cause of action in the original complaint was overruled. By filing an amended complaint, the plaintiff opens the door to a demurrer to the entire amended complaint, which supersedes the original complaint. (*Carlton v. Dr. Pepper Snapple Group, Inc*. (2014) 228 Cal.App.4th 1200, 1211-- rejecting plaintiffs contention that motion for reconsideration under Code Civ. Proc., §1008 was defendant's exclusive means of having judge again consider demurrer to causes of action as to which previous demurrer was overruled). Here, when Plaintiffs filed their SAC, they opened the door to a demurrer to the entire amended complaint. It is irrelevant whether Defendants' demurrer is identical to that filed on February 5, 2016, or that it was overruled. That demurrer was asserted against Plaintiffs' initial Complaint, not the SAC.

Alternate Theories
Any valid cause of action overcomes demurrer; it is not necessary that the cause of action be the one intended by plaintiff. The test is whether the complaint states *any* valid claim entitling plaintiff to relief. Thus, plaintiff may be mistaken as to the nature of the case, or the legal theory on which he or she can prevail. But if the essential facts of *some* valid cause of action are alleged, the complaint is good against a general demurrer. (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 38-39; *Adelman v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 352, 359; *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 998.) Here, in the alternative or in the event Defendants' demurrers are sustained as to the entire Second Amended Complaint, Plaintiffs assert a cause of action for failure to disclose acts of malpractice. Although a general demurrer will be overruled if the complaint states any valid cause of action, here, Plaintiffs assert no facts to support a cause of action for failure to disclose acts of malpractice. Further, Plaintiffs adequately plead causes of action: two (negligent misrepresentation); three (intentional infliction of emotional distress); and four (negligent Infliction of emotional distress), so there is no need to invoke this principle.

Motion to strike

California Rule of Court, rule 3.1113, subdivisions (a) and (b) require the moving party to serve and file a memorandum that contains "a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." Here, no motion to strike is on

file and no supporting documents were submitted in support thereof. *Motion to strike is ordered off calendar.*

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A. M. Simpson on 7/14/16 .
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Kleimmin v. Holistic and Integrative Medicine, et al.***, Superior Court Case No. 15CECG03149

Hearing Date: **August 3, 2016 (Dept. 503)**

Motion: Demurrers to Complaint by defendants Susan Stone and Satareh Tais

Tentative Ruling:

To sustain Satareh Tais and Susan Stone's demurrers to the Complaint, without leave to amend. (Code Civ. Proc. § 430.10(e).) Prevailing parties to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to the demurring defendants.

Explanation:

Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies. (See *Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300.) The running of the statute must appear "clearly and affirmatively" from the face of the complaint. It is not enough that the complaint might be time-barred. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42.) Which statute of limitations applies depends on the gravamen of the cause of action. (*Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 874-875.)

A claim for medical malpractice, upon discovery, is subject to a one-year statute of limitations. (Code Civ. Proc. § 340.5.) Such a claim may be tolled where a Notice of Intent is served upon the defendant health care provider(s), but only for the proscribed period. (See Code of Civ. Proc. § 364.)

Plaintiff basically alleges that the statute of limitations began to run by June 7, 2014 (Complaint ¶ 10), making June 7, 2015 the deadline for filing suit. Plaintiff alleges that she served defendants with a Notice of Intent to Sue on April 11-12, 2015. (Complaint ¶ 6.) Since the notice was "served within 90 days of the expiration of the applicable statute of limitations," the time to commence the action was "extended 90 days from service of the notice." (Code Civ. Proc. § 364(d).) Assuming the notices were served on April 12, the last day to file suit would be July 11, 2015. The Complaint was filed on October 9, 2015, clearly too late.

The court has no opposition on file. The docket reflects that plaintiff's oppositions were rejected for failure to comply with Local Rule 4.1.13. According to the reply briefs, plaintiff argues in the oppositions that because plaintiff was comatose during part of the hospitalization, the running of the statute of limitations was tolled. In the first paragraph 10 of the Complaint plaintiff alleges that she "discovered that the care of defendants's [sic], and each of them fell below the standard of care and was

negligent in early June of 2014, **after** she was discharged from the hospital following a hospitalization that lasted for more than a month,, during much of which time she was unconscious …" (Emphasis added.) Plaintiff then alleges that she "did not know and could not have knwon [sic] of the negligence of defendants, and each of them before approximately June 7, 2014." (Complaint first ¶ 10.) Plaintiff's own Complaint alleges that she discovered the negligence in early June 2014, or more specifically, June 7, 2014, after she was released from the hospital and no longer comatose. Even starting the clock when plaintiff alleges it should start, the action is untimely.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A. M. Simpson on 8/1/16 .
(Judge's initials) (Date)
)

(19) **Tentative Ruling**

Re: ***Agadzhanyan v. Drury***
Fresno Superior Court Case No. 15CECG00491

Hearing Date: August 3, 2016 (Department 503)

Motion: by defendant Drury for summary adjudication

Tentative Ruling:

To deny.

Explanation:

California Rules of Court, Rule 3.1350(b) states, in part:

> "If summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts."

Drury's notice of motion mentions no defendant, no plaintiff, no cross-defendant, no pleading at all, no specific cause of action, no defense, no claim for damage, and no duty. A ruling on a bare issue of law appears to be what Drury seeks, as he asks for "a judgment or order so indicating on this issue for all purposes."

"The motion for summary judgment is a special statutory proceeding and confined to the limits charted by the terms of the statute. [citation omitted] When those limits are passed the court exceeds its jurisdiction and the order is void." *County of Los Angeles v. Stone* (1961) 198 Cal. App. 2d 640, 647 (concurrence). Indeed, it cannot even be sought in certain types of cases, to this day - such as those under the Consumer Legal Remedies Act (Civil Code section 1781(c), election contests, etc. Witkin, 6 California Procedure, § 184.

Although the issue raised by moving party is pertinent to this case, it is not one that can be summarily adjudicated on the basis of the notice of motion presented.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A. M. Simpson on 8/1/16 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Max Rossiter v. Ali Najafi, M.D.***
Superior Court Case No. 15CECG03899

Hearing Date: Wednesday, August 3, 2016 (**Dept. 503**)

Motions: (1) Defendant Ali Najafi, M.D.'s Demurrer to Plaintiffs Max Rossiter's and Roberta Rossiter's Complaint

(2) Defendant Ali Najafi, M.D.'s Motion to Strike Portions of Plaintiffs Max Rossiter's and Roberta Rossiter's Complaint

Tentative Ruling:

To grant with leave to amend Defendant Ali Najafi, M.D.'s motion to strike portions of Plaintiffs Max Rossiter's and Roberta Rossiter's complaint. (Code Civ. Proc., § 436, subd. (b).)

To find moot Defendant Ali Najafi, M.D.'s demurrer to Plaintiffs Max Rossiter's and Roberta Rossiter's complaint.

To grant Plaintiffs Max Rossiter and Roberta Rossiter 30 days, running from service of the minute order by the clerk, to file a first amended complaint. (Code Civ. Proc., § 472a, subd. (d).) All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Defendant's Motion to Strike Portions of Plaintiffs' Complaint

Defendant Ali Najafi, M.D. ("Defendant") moves to strike Plaintiff Roberta Rossiter's complaint pursuant to Code of Civil Procedure section 436, subdivision (b). Defendant argues that Plaintiff Roberta Rossiter's complaint is not properly before the Court and must be struck because Plaintiff Max Rossiter is attempting to represent his wife in this action even though he is not legally authorized to do so.

"While any person may represent himself, and his own interests, at law and in legal proceedings: 'No person shall practice law (for another) in this State unless he is an active member of the state bar.' (Bus. & Prof. Code, § 6125.) A violation of this statute is a criminal act. ([Bus. & Prof. Code], § 6126.)" (*Abar v. Rogers* (1981) 124 Cal.App.3d 862, 865.) After reviewing the complaint, the Court notes that Plaintiff Max Rossiter is the only person named at the top left margin of the first page of the complaint and is the only person who signed the complaint. (Code Civ. Proc., § 128.7, subd. (a) ["Every pleading … shall be signed by at least one attorney of record …, or, if the party is not represented by an attorney, shall be signed by the party.]; Cal. Rules of Court, rule 2.111(1) [requiring that an attorney or the party, if the party is not

represented by an attorney, list identifying information, including their name and State Bar membership number, if the individual has one, in the upper left margin of the first page of each paper filed with the court].) Further, the Court notes that Plaintiff Max Rossiter has not listed a State Bar membership number in the upper left margin of the first page of the complaint or alleged that he is a member of the State Bar of California anywhere in the complaint. Therefore, it appears from the face of the complaint that, even though Plaintiff Max Rossiter is not a lawyer, he is improperly attempting to represent his spouse, Plaintiff Roberta Rossiter, in the instant action.

Accordingly, since Plaintiff Roberta Rossiter's complaint is "not drawn or filed in conformity with the laws of this state [and] a court rule," the Court strikes with leave to amend Plaintiff Roberta Rossiter's complaint pursuant to Code of Civil Procedure section 436, subdivision (b).

Defendant's Demurrer to Plaintiffs' Complaint

Defendant Ali Najafi, M.D. ("Defendant") demurs to Plaintiffs Max Rossiter's and Roberta Rossiter's complaint pursuant to Code of Civil Procedure section 430.10, subdivisions (b), (d), and (e), on the ground that Plaintiff Max Rossiter does not have the legal capacity to sue for Plaintiff Roberta Rossiter. However, as the Court has granted with leave to amend Defendant's motion to strike Plaintiff Roberta Rossiter's complaint on the ground that Plaintiff Max Rossiter cannot legally represent Plaintiff Roberta Rossiter, the Court finds that Defendant's demurrer to Plaintiffs' complaint is moot.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A. M. Simpson on 8/1/16 .
(Judge's initials) (Date)